IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.873 OF 2006
Along with
Civil Application No.1884 of 2006

Shri Appaji Nagoji Patil, .. Appellant.

Vs

Sou.Gangubai Bhima Patil and ors. .. Respondents.

Mr G.N.Salunke, for the appellant.

CORAM : D.B.BHOSALE,J.
DATE : 16.01.2007

PC:

1. Heard the learned counsel for the appellant.

2. This Second Appeal is directed against the concurrent Judgments of the courts below, by which the suit filed by the respondent-plaintiff for partition and separate possession of her share in the ancestral properties of the joint family, has been decreed. Mr. Salunke, learned counsel for the appellant, has not raised any dispute as to the finding that the suit lands are the ancestral properties. However, he assailed the judgments of the courts below mainly on the ground that the plaintiff did not step into witness box and her power of attorney, who was examined on her behalf, had no knowledge of the material facts and in view thereof, this is a case of no evidence. He submitted that the suit deserves to be dismissed on that count alone since

the question of surrender by the respondents stands established. My attention was drawn to paragraph 15 of the judgment of the appeal court in support of this contention. Reliance was also placed on the judgment of this Court in Janki Vashdeo Bhojwani and anr Vs. Inusind Bank and ors, 2005 (1) Mh.L.J.1170. He further submitted that in view of the provisions of Articles 106 and 110 of the Limitation Act, the suit ought to have been dismissed as barred by limitation.

3. It is true that the power of attorney of the plaintiff was examined on her behalf and to some of the material questions put to him he expressed no knowledge about those facts. In my opinion, merely because the plaintiff herself did not step into the witness box to deny the surrender does not mean that the surrender stands established by the defendant. The defendant came before the court with a case that the plaintiff surrendered her share in the ancestral properties in a suit filed by the plaintiff for partition and, therefore,the initial burden was on the defendant to prove the surrender to shift the burden on the plaintiff. Admittedly, the properties are the ancestral lands of the parties and that there was a categoric denial of a witness about the alleged surrender. The defendant has not brought any material, worth taking note of, to prove the alleged surrender.

I do not find any error committed by the courts below in putting the burden on the defendant to establish surrender. The defendant has failed to shift the burden on the plaintiff on the point of surrender. Insofar as the submission of Mr Salunke on the point of limitation is concerned, a bare perusal of the provisions of Articles 106 and 110 clearly demonstrate that they do not apply at all to the facts of the present case. The courts below have rightly held that the suit was filed within limitation. Considering that there are concurrent findings of facts and as I find that there is sufficient material on record to sustain those findings and considering the extremely limited jurisdiction of this Court under section 100 of the Code of Civil Procedure to disturb the findings of fact, this appeal fails and is dismissed as such. As a consequence thereof, the civil application stands disposed of.

(D.B.BHOSALE,J.)